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IN THE

# Supreme Court of the United States

RICHARD A. BORGNER AND
THE AMERICAN ACADEMY OF IMPLANT DENTISTRY,

*Petitioners,*

v.

THE FLORIDA BOARD OF DENTISTRY,
AND JOHN O. AGWUNOBI,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF AMICUS CURIAE OF THE AMERICAN BOARD OF IMPLANTOLOGY/IMPLANT DENTISTRY IN SUPPORT OF THE PETITIONERS' REQUEST FOR A WRIT OF CERTIORARI

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15 pp

## QUESTION PRESENTED

Amicus addresses the following questions:

Whether the Florida Board of Dentistry (or any state board regulating professional services) may accomplish its stated purpose of protecting consumers from confusion regarding certification of a professional that is approved by the state vis-à-vis certification by an independent certification board by requiring advertisements announcing the independent certification to be accompanied by a scripted disclaimer that is both inaccurate and demeaning.

Does the "disclaimer" required by the Florida legislation interfere with the public's right to information that assists in choosing professional services?

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## INTEREST OF THE AMICUS*

The American Board of Implantology/Implant Dentistry ("ABOI/ID") is an independent certification board chartered under the General Not-For-Profit Corporation Act of the State of Illinois. Its mission is to elevate the standards and advance the science and art of implant dentistry by encouraging its study and improving its practice. To this end, the ABOI/ID conducts examinations to determine the qualifications and competence of dentists who voluntarily apply to the ABOI/ID for certification as diplomates.

Implant dentistry involves the replacement of missing or defective teeth by surgically implanting devices in the jaw to which prosthetics, that include everything from a single artificial tooth to complete dentures, can be firmly, and are often permanently, attached. As such, when an existing tooth or teeth cannot be restored, or are missing, implant dentistry constitutes the current state of the art for artificial restorations that most closely duplicates the function and appearance of natural teeth. Because implant dentistry involves surgery of the jaw and gums, and construction of the prosthetic device, it involves various aspects of the recognized dental specialties of oral surgery, periodontics and prosthodontics.

The ADA does not recognize the field of implant dentistry as a specialty of dental practice. Accordingly, the ABOI/ID does not have ADA recognition as a specialty certifying board. However, the ABOI/ID Bylaws provide that in fulfilling its purpose and objectives it will be guided by the ADA's Requirements for National Certifying Boards for Dental Specialties.

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* The consents of the parties to the filing of this amicus brief are on file with the clerk. No counsel for a party authored any part of this brief. No monetary contribution to the preparation and submission of this brief was made by anyone other than the ABOI/ID.

The ABOI/ID is sponsored by the American Academy of Implant Dentistry ("AAID"), one of the petitioners in this case. The ADA's Requirements for National Certifying Boards for Dental Specialties require that a dental certifying board have such a sponsorship. For example, the American Board of Oral and Maxillofacial Surgeons, the certifying agency for the ADA recognized specialty of oral surgery, is sponsored by the American Association of Oral and Maxillofacial Surgeons, an ADA affiliate organization. The affairs of the ABOI/ID, including the examination process, exam construction and the qualifications of applicants for certification are conducted by the ABOI/ID Board of Directors who are elected by the Board's diplomates. The Board members receive no remuneration other than reimbursement of actual expenses.

The ABOI/ID has a direct stake in the outcome of this case. To obtain certification as an ABOI/ID diplomate a dentist must document advanced education and experience, undergo a review of cases he or she has treated and pass a rigorous oral and written examination that is based on psychometric principles.

The ABOI/ID has five routes by which an applicant may qualify to take its diplomate examinations:

1. a. *Education:* Graduation from a full-time postdoctoral program in oral implantology/implant dentistry that is at least two years in length. The program must be sponsored by an institution that is properly chartered and licensed to operate and offer instruction leading to degrees, diplomas or certificates with recognized educational validity (i.e., a dental school accredited by the Commission on Dental Accreditation of the ADA or a hospital accredited by the Joint Commission on Accreditation of Healthcare Organizations.)

   b. *Experience:* At least five years of clinical practice in implant dentistry, including the advanced education program.



   c. *Cases:* Ten arches of implant treatment. (A treated arch means that one or more implants were placed and restored.)

2. a. *Education:* Graduation from an advanced education program in oral and maxillofacial surgery, periodontology or prosthodontics that is accredited by the Commission on Dental Accreditation of the ADA and Board certification in the area of specialty or a Fellow member of the American Academy of Implant Dentistry or a specialist who is an active member of the Academy of Osseointegration.

   b. *Experience:* At least five years of clinical practice in implant dentistry, including the advanced education program.

   c. *Cases:* Ten arches of implant treatment.

3. a. *Education:* Certificate from an advanced education program in oral and maxillofacial surgery, periodontology or prosthodontics that is accredited by the Commission on Dental Accreditation of the ADA.

   b. *Experience:* At least five years of clinical practice in implant dentistry, **not** including the time in the advanced education program.

   c. *Cases:* Ten arches of implant treatment.

4. a. *Education:* Education as a general dentist plus 500 continuing education hours in implant dentistry and 70 continuing education hours related to medical evaluations, pharmacology, physical diagnosis and/or sedation, and a certificate documenting one of the following: a two-year general practice residency program or Associate Fellowship in the AAID or certification by the American Board of General Dentistry or membership in the Academy of General Dentistry at the level of Fellowship or higher.

   b. *Experience:* At least six years of clinical practice in implant dentistry.

c. *Cases:* Ten arches of implant treatment.

5. a. *Education:* Faculty member of an ADA accredited dental education program and education as a general dentist plus 500 hours of continuing education hours in implant dentistry and 70 continuing education hours related to medical evaluations, pharmacology, physical diagnosis and/or sedation, or other educationally based dental credentials, including graduation from an advanced education program in an ADA-recognized specialty that does not interface with implant dentistry and is accredited by the ADA Commission on Dental Accreditation or an advanced degree such as Master of Science in Dentistry or Doctor of Philosophy degree in a biomedically related field.

b. *Experience:* At least six years of full-time or ten years of part-time teaching or clinical supervision in implant dentistry.

c. *Cases:* One hundred arches of implant treatment. Faculty must have been the primary provider of implant treatment of 50 arches in their area of practice plus supervision of 150 additional arches of treatment.

The ABOI/ID has had its certification program in effect since 1990. It currently has 243 certified diplomates. For the years 1996 through 2001, inclusive, the only years for which figures are retrievable within the time constraints for filing this *amicus* brief, 73 diplomates have been certified, for an approximate average of 10 per year. During this same period, 28 candidates failed the examination, for an average of 4 per year.

ABOI/ID diplomates have a First Amendment right to communicate these qualifications to prospective patients in a manner that is not false or misleading. Moreover, prospective patients have a corresponding right to unfettered access to such information. The Florida statute that requires any announcement of ABOI/ID diplomate status to be accompanied by the disclaimer that this certification is not



recognized as a BONA FIDE specialty accrediting organization by the State of Florida or the ADA constitutes officially mandated government misinformation and violates the First Amendment rights of the ABOI/ID diplomates and the public. Fla. Stat. § 466.0282(3).

## ARGUMENT

Amicus fully agrees with petitioners that the scripted disclaimer required by the Florida statute, Fla. Stat. § 466.0282(3), to accompany an ABOI/ID diplomate's advertisement of certification goes far beyond the authority of a state to advance a legitimate government interest by regulating commercial speech in accordance with the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 576 (1980).

The immediate wrong inflicted by the statute upon a dentist like the petitioner, Dr. Borgner, who has obtained a diplomate certification by passing through a rigorous process of oral and written examinations, case review and the documentation of his education and experience, is that the statute compels characterizing this certification as bogus or not genuine. Webster's Ninth New Collegiate Dictionary (1986) defines BONA FIDE as: "1: made in good faith without fraud or deceit (a *bona fide* offer to buy a farm) 2: made with earnest intent: SINCERE 3: neither specious nor counterfeit: GENUINE *syn* see AUTHENTIC." The counterpart of something not being authentic is that it is not genuine or bogus. Clearly, that is the meaning the public will take if a dentist can be compelled to attach such a statement to the announcement of an earned certification.

Compelling a dentist to classify the announcement of a diplomate certification as not genuine or bogus is the practical equivalent of prohibiting such an announcement. Where First Amendment rights are concerned, the government cannot seek to accomplish indirectly what it is prohibited by the Constitution from doing directly. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 78 (1990). Thus, *Central Hudson* teaches that the type of commercial speech

at issue here, if not false or misleading, may only be restricted if "the asserted governmental interest is substantial." If so, it must then be determined "whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary." *Central Hudson*, 447 U.S. at 566. Stated otherwise, the issue in this case is whether the only manner in which the State of Florida can accomplish its stated interest in this matter is to compel an onerous disclaimer that amounts to the equivalent of a ban on announcements of ABOI/ID diplomate status.

Before the Eleventh Circuit the Florida Dental Board conceded that an announcement of ABOI/ID certification was only potentially misleading, thus requiring application of the latter three prongs of the *Central Hudson* test. Pet. App. 8a. The court below concluded that *Central Hudson*'s second prong was satisfied by Florida's "desire to regulate dentists' advertisements due to its interest in 'protecting its citizens from unqualified and incompetent health care professionals...'" and proceeded to the next two segments of the *Central Hudson* test. Pet. App. 9a.

In applying the third part of the test requiring the State to demonstrate that its required disclaimer advanced the State's interest in a direct and material way, the Eleventh Circuit recognized that this burden "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995). The court below found evidence of such harm in telephone surveys proffered by the Florida Board. Specifically, the court found that the surveys showed that consumers would be misled into thinking that a dentist advertising ABOI/ID certification was recognized by the State. Pet. App. 10a, 13a.

The court does not explain how this alleged confusion of consumers relates to the court's underlying finding that the



second prong of the *Central Hudson* test is satisfied by "Florida's interest in protecting its citizens from unqualified and incompetent health care professionals...." Pet. App. 9a. The ABOI/ID certification admittedly is not a sham. Presumably, the Florida Board's licensing process assures the competency of the dentists it licenses, as no license other than that of a general dentist is required to perform any implant dentistry procedure or any other dental specialty procedure in Florida. Pet. App. 42a. Certification, whether by a recognized specialty board or pursuant to State standards, presumably recognizes only education and testing that indicates advanced learning and experience over and above the acceptable level of competency. Therefore, Florida's requirement that an ABOI/ID diplomate self-designate that this earned credential is not BONA FIDE does not relate to competence and creates more confusion than it resolves.

Moreover, the questions in the Florida Board telephone survey that the appellate court found to be "most persuasive" are fatally flawed. Pet. App. 11a. Survey respondents were asked their perceptions of dentists who advertised as specialists. This survey, conducted solely for the purposes of this litigation, did not impress the district court. The district court found that the report showed only that 500 individuals were interviewed about their perceptions of Florida's role in overseeing dentists who advertise (1) as being **specialists** in a particular area, (2) as being board-certified **specialists** in a particular area, or (3) as having **practices limited to** a certain area, the district court went on to hold:

> Although the report fails to set out the precise questions that were asked of the respondents, it appears that nearly two-thirds of the respondents said they believed that dentists who advertise as being board-certified specialists in a particular area have been certified directly by the State of Florida or certified by a national organization that is recognized by the State of Florida. In addition, the report indicates that approximately fifty-seven (57%) of the respondents said they believed that dentists who

> advertise as being specialists in a particular area or as having their practices limited to a certain area have been either directly or indirectly certified by the State of Florida. Again, while these results may be interesting, they do not convince this court that the State of Florida, through enactment of section 466.0282, targets a genuine threat of harm and/or furthers substantial state interests in a direct and effective manner.

Pet. App. 44a. While the district court's holding that this survey does not establish that Florida's statute addresses a threat of substantial harm or furthers a substantial state interest is telling, even more telling is the fact that the survey questions have no relationship to the statute's provisions vis-a-vis a non-specialist's announcement of a valid certification. The survey questions addressed perceptions about dentists who advertise as **specialists** or use the term **practice limited to** in their advertisements to connote specialty status. Fla. Stat. § 466.0282(1) clearly prohibits announcement as a "specialist" by any dentist not recognized as such by an ADA recognized specialty certification board. Fla. Stat. § 466.0282(2) clearly prohibits a dentist who does not meet its qualifications from using the term "practice limited to." The survey questions do not address what perceptions the respondents might have of a dentist who advertised ABOI/ID certification without using the terms "specialist" or "practice limited to." Therefore, they are not evidence that consumer confusion will result from a dentist advertising ABOI/ID certification who does not use the terms "specialist" or "practice limited to" in the advertisement.

An even more basic flaw in the court's reliance on the survey is the survey's complete failure to address the last prong of *Central Hudson*. No questions were posed that would have revealed the respondents' perceptions of the scripted disclaimer. No questions were directed at determining whether a less burdensome approach than having a dentist state that his or her certification was not BONA FIDE might satisfy the State of Florida's concerns.



*Cf., Ibanez v. Florida Dep't of Business & Prof'l Regulation*, 512 U.S. 136, 146 (1994).

The Eleventh Circuit also failed to consider the public's interest in receiving information about dentists who have pursued advanced education and training in implant dentistry. The corollary to the right of free speech is the public's right to receive and evaluate information. The public's unfettered right to legitimate information is particularly important in the area of choosing a health care professional. This Court has noted that in such a situation overly paternalistic concerns of the state must fall before the public's right to information that is factual and not misleading. In striking down restrictions on pharmacist price advertising in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1946), this Court observed that:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open channels of communication rather than to close them. If they are truly open, nothing prevents the "professional" pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. (Emphasis added.)

*Id.* at 770. The Court's observations on price advertising are applicable to the situation here. The First Amendment right to health information does not stop at price. A person considering a choice of health care professionals has the right to factual information on education, experience and

training. This right suffers as much, if not more, from misinformation caused by an arbitrary government determination that the health provider must designate his or her qualifications as NOT RECOGNIZED AS BONA FIDE as from a statute that would prohibit the advertisement in its entirety.

Finally, it bears emphasizing that the State of Florida has prohibited ABOI/ID diplomates from communicating their qualifications to the public since 1996. Pet. Br. 3, 4. Unless the question of the propriety of scripted "NOT . . . BONA FIDE" disclaimers is addressed, the possibility of future litigation over alternative or substitute burdensome disclaimers, with the attendant delay in the exercise of the advertiser's and the public's First Amendment rights, will be ever present. These delays are contrary to the principle that "...any deprivation of constitutional rights calls for prompt rectification." *Watson v. City of Memphis*, 373 U.S. 526, 532-33 (1963). The all-encompassing, misleading scope of such scripted disclaimers is also contrary to the principle announced in *Edenfeld v. Fane*, 507 U.S. 761 (1995), where the petitioner was seeking the right enjoyed in other states to solicit accounting clients in Florida. Quoting from *NAACP v. Button*, 371 U.S. 415, 438 (1963), this Court said:

> 'Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.'

*Id.* at 777. The broad and burdensome proscriptive disclaimer in this case should be struck, and the propriety of a state's authority to compel statements by requiring scripted disclaimers should be addressed.



## CONCLUSION

Petitioners should be granted a writ of certiorari in this matter.

Respectfully submitted,

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